J&M Power Resources Sdn Bhd v Lim Ann Liang & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-561–04 OF 2015
ABDUL AZIZ ABDUL RAHIM, ROHANA YUSUF AND PRASAD ABRAHAM JJCA
7 MARCH 2016

Civil Procedure — Appeal — Appellate intervention — Trial judge failing to address mind to pertinent issues — Nonspeaking judgment — Whether appealable error justifying appellate intervention

Civil Procedure — Trial — Procedure — Application by defendant to reopen case — Discretion of trial judge — Plaintiff's case closed in absence of defendant and defendant's counsel — Whether court had discretion to reopen case to allow defendant cross-examine plaintiff's witnesses — Whether defendant's absence due to genuine mistake — Whether inordinate delay in applying to reopen case — Whether plaintiff prejudiced by reopening of case

The plaintiffs/respondents claimed against the defendant/appellant for repayment of monies advanced to the defendant. The trial commenced on 6 August 2013 with the hearing of three witnesses for the plaintiffs. All witnesses were cross-examined by the defendant's counsel. Thereafter the case was adjourned several times at the defendant's request. When the trial continued on 25 June 2014, neither the defendant nor its counsel were in court. The trial proceeded with four witnesses for the plaintiffs giving evidence. The plaintiff closed its case and in the absence of any representative of the defendant, the case was then fixed for submission on 16 July 2014. On 27 June 2014, the court received a letter of complaint from the defendant stating that the defendant had been informed by counsel for the plaintiff that the trial was not going on 25 June 2014. Pursuant to this, the court fixed 22 August 2014 to allow the defendant to prepare for the submission. The defendant also applied to set aside the orders dated 25 June 2014 and to reopen the trial for the purposes of cross-examination of the plaintiff's witnesses and the hearing of defendant's counterclaim. The learned judge allowed the defendant's application, but only to the extent that the defendant's counterclaim was fixed for hearing. The trial of the defendant's counterclaim proceeded. After hearing the submission of the parties, the plaintiffs' claim was allowed and the defendant's counterclaim was dismissed. Hence the present appeal. The question to be decided was whether the defendant's absence was deliberate and not due to an accident or mistake.

Held, allowing the appeal and ordering a retrial:

(1) The defendant's absence was caused by a mistake ie by virtue of the letter from plaintiff's solicitors. The defendant had not been guilty of inordinate delay in making an application for reopening of this case which the court below only allowed in respect of the counterclaim (see para 23).

(2) As the case involved a trial of facts through oral testimony and veracity of documents, the opportunity to cross-examine plaintiff's witnesses was crucial bearing in mind the evidential burden of proof lies on the plaintiffs. No prejudice would befall the plaintiffs if the court allowed the appeal (see para 24).

(3) The trial judge failed to address her mind as to why the learned judge chose to exercise her discretion to refuse the defendant the right to reopen the trial. The learned judge's judgment remained 'nonspeaking' on this point which constituted an appealable error which would require appellate intervention (see para 26).

[Bahasa Malaysia summary

Plaintif-plaintif/responden-responden menuntut terhadap defendan/perayu bagi bayaran wang yang didahulukan kepada defendan. Perbicaraan bermula pada 6 Ogos 2013 dengan pendengaran tiga saksi untuk plaintif-plaintif. Kesemua saksi diperiksa balas oleh peguam defendan. Selepas itu kes ditangguh beberapa kali atas permintaan defendan. Apabila perbicaraan bersambung pada 25 Jun 2014, defendan ataupun peguamnya tidak hadir di mahkamah. Perbicaraan diteruskan dengan empat saksi bagi plaintif-plaintif memberi keterangan. Plaintif menutup kesnya dan dalam ketidakhadiran mana-mana wakil defendan, kes kemudiannya ditetapkan untuk penghujahan pada 16 Julai 2014. Pada 27 Jun 2014, mahkamah menerima surat aduan daripada defendan menyatakan bahawa defendan telah diberitahu oleh peguam untuk plaintif bahawa perbicaraan tidak berlangsung pada 25 Jun 2014. Berikutan ini, mahkamah menetapkan 22 Ogos 2014 untuk membenarkan defendan menyediakan penghujahan tersebut. Defendan juga memohon untuk mengenepikan perintah-perintah bertarikh 25 Jun 2014 dan untuk membuka semula perbicaraan bagi tujuan pemeriksaan balas saksi-saksi dan pendengaran tuntutan balas defendan. Hakim yang bijaksana membenarkan permohonan defendan, tetapi hanya setakat bahawa tuntutan balas defendan ditetapkan untuk pendengaran. Tuntutan balas defendan diteruskan. Selepas pendengaran hujahan pihak-pihak, tuntutan plaintif dibenarkan dan tuntutan balas defendan ditolak. Maka rayuan ini. Persoalan untuk ditentukan adalah sama ada ketidakhadiran defendan adalah sengaja dan bukan akibat kemalangan atau kesilapan.

Diputuskan, membenarkan rayuan dan memerintah perbicaraan semula:

(1) Ketidakhadiran defendan disebabkan oleh kesilapan iaitu mengikut surat daripada peguam plaintif. Defendan tidak bersalah terhadap kelewatan yang melampau dalam membuat permohonan bagi pembukaan semula kes ini yang mana mahkamah bawahan hanya membenarkan berkaitan tuntutan balas (lihat perenggan 23).

(2) Memandangkan kes melibatkan perbicaraan fakta melalui keterangan lisan dan ketepatan dokumen-dokumen, peluang untuk memeriksa balas saksi-saksi plaintif adalah penting mengambil kira beban pembuktian keterangan terletak ke atas plaintif-plaintif. Tiada prejudis akan menimpa plaintif-plaintif jika mahkamah membenarkan rayuan (lihat perenggan 24).

(3) Hakim perbicaraan gagal untuk mengemukakan fikirannya mengapa hakim yang bijaksana memilih untuk menjalankan budi bicaranya untuk menolak hak defendan membuka semula perbicaraan. Penghakiman hakim yang bijaksana kekal 'nonspeaking' atas poin ini yang mana membentuk kesilapan yang boleh dirayu yang memerlukan campur tangan mahkamah rayuan (lihat perenggan 26).]

Notes

For cases on appellate intervention, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 1019–1020.

For cases on procedure, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 10401–10406.

Cases referred to

Shocked and another v Goldschmidt and others [1998] 1 All ER 372, CA (refd)

Appeal from: Civil Suit No 22NCC-1808–12 of 2012 (High Court, Kuala Lumpur)

Sulaiman Abdullah (Andy Yong and HY Lee with him) (HY Lee & Co) for the appellant.

Teng Kam Wah (Teng Kam Wah & Co) for the respondent.

Prasad Abraham JCA:

[1] We heard and disposed of this appeal on 23 November 2015 wherein we allowed the appeal and remitted this matter back to the High Court for a retrial before the same High Court judge. We shall refer to the parties as they were referred at to in the High Court ie the appellant as defendant and the respondents as plaintiffs.

MATERIAL FACTS

[2] The first plaintiff was an accountant and had started his employment with J&M Power Sdn Bhd ('JMP') on 3 June 1999. His employment was transferred to Beluga (M) Sdn Bhd ('Beluga') in 2007.

[3] Towards the end of 1999, the people behind JMP formed a new company, J&M Power Resources Sdn Bhd ('the defendant'). The defendant was involved in the business of oil and gas and several other traffic light projects with Dewan Bandaraya Kuala Lumpur.

[4] The shareholders of the defendant were Rabiyaih bt Abdul Malek ('DW1') and her mother, Sophia Ismail bt Sheikh Hussain. DW1 was also the managing director of the defendant company.

[5] All the three companies, JMP, Beluga and the defendant shared the same premise and operated under the same management.

[6] The management of the three companies was carried out by the first plaintiff, who was also the accountant of these companies.

[7] According to DW1, the 'first plaintiff managed the accounts of the defendant, source financing, administration, human resources and liaising with the auditor and the banks'. This arrangement prevailed until July 2012 when the first plaintiff left the defendant's company.

[8] The third plaintiff is the brother of the first plaintiff. The first, the third and the fourth plaintiffs are directors of the second plaintiff company, All Built Sdn Bhd ('ABSB').

[9] It is the plaintiffs' evidence that they had given loans to the defendant in order to overcome its financial difficulties, including paying the suppliers, which formed the basis of the plaintiff's claim for repayment of the monies he advanced this was denied by the defendant.

CHRONOLOGY OF EVENTS IN COURT

[10] The trial commenced on 6 August 2013 with the hearing of three witnesses for the plaintiffs. All witnesses were cross-examined by the defendant's counsel. The case was adjourned to the 3–4 December 2013, for the continuation of the trial.

[11] On 3 December 2013, the trial was further adjourned to 28–30 May 2014 as counsel for the defendant was on medical leave.

[12] On 28 May 2014, counsel for the defendant applied for an adjournment as DW1 had to attend to her mother in the hospital. The case was adjourned to 29 May 2014. On 29 May 2014, counsel for the defendant applied for another adjournment as DW1 still had to attend to her mother in the hospital. The application was allowed and the case was adjourned to 24–27 June 2014.

[13] Meanwhile, counsel for the defendant has filed an application for discharge from continuing to act for the defendant. The order in terms was granted on 10 June 2014.

[14] On 24 June 2014, the parties applied for a short adjournment as they wanted to settle the case. DW1 appeared in person to inform the court of the proposed settlement. The request for adjournment was allowed by this court and the parties were informed that if the case could not be settled, the trial will continue the next day, on 25 June 2014 as the case has been fixed for a continuous trial until 27 June 2014.

[15] The trial continued on 25 June 2014. Neither DW1, nor the defendant's counsel, was in court for the continued hearing. The trial proceeded with four witnesses for the plaintiffs giving evidence. The plaintiff closed its case and the court called the defence to start its case. In the absence of any representative of the defendant's company and its counsel, the case was then fixed for submission on 16 July 2014.

[16] On 27 June 2014, this court received a letter of complaint from the defendant. The defendant's complaint was that the representative of the defendant, DW1 was informed by counsel for the plaintiff that the trial was not going on 25 June 2014 and that she (DW1) need not have to attend the trial on the next date that has been fixed for trial. Upon receipt of this letter, the court fixed 11 July 2014 for case management.

[17] On 11 July 2014, after hearing the parties, the court vacated 16 July 2014 for hearing of submissions in the case and adjourned the same to 22 August 2014 to allow the defendant to prepare for the submission.

[18] In the meantime, the defendant has filed an application to set aside the orders dated 25 June 2014 and applied to reopen the trial for the purposes of cross-examination of the plaintiff's witnesses and the hearing of defendant's counterclaim.

[19] After hearing the submission of the parties, the court has allowed the defendant's application, but only to the extent that the defendant's counterclaim was fixed for hearing. There was no appeal against this decision given on 13 October 2014.

[20] The defendant's counterclaim proceeded on 14 November 2014 and DW1 gave evidence for the defendant. After hearing the submission of the parties, the plaintiffs' claim was allowed and the defendant's counterclaim was dismissed with costs of RM20,000.

FINDINGS

[21] The pivot of the argument of the appellant is that on the 24 of June 2014 the matter was adjourned to 25 June 2014 by High Court because of a pending settlement. At least that was what the appellant understood the position to be. The respondent on the other hand argued that the matter was to proceed on 25 June 2016. The trial however did continue. The defendants argue that they were informed by the plaintiff's solicitors that the defendant need not attend court on the aforesaid date.

[22] This by itself would not be that pertinent save for the fact that the plaintiff had called four witnesses who escaped the scrutiny of cross-examination and thereafter the plaintiff closed its case. The defendants and its counsel being absent was also not able to present its case and in fact the court had already fixed the matter for submissions. The defendant was only able to salvage their counterclaim by application and the court allowed a trial of the same wherein the counterclaim was dismissed.

[23] The question for us to decide is whether the defendant's absence on 26 June 2014 was deliberate and not due to an accident or mistake. We find that the defendant's absence was caused by a mistake ie by virtue of the letter from plaintiff's solicitors. The defendant had not been guilty of inordinate delay in making an application for reopening of this case which the court below only allowed in respect of the counterclaim.

[24] As the case involved a trial of facts through oral testimony and veracity of documents, the opportunity to cross-examine plaintiff's witnesses was crucial bearing in mind the evidential burden of proof lies on the plaintiffs. We are further of the view that no prejudice would befall the plaintiffs if we allow the appeal and we are therefore in agreement with submissions of counsel for the defendant.

[25] We refer to the decision of the English Court of Appeal in *Shocked and another v Goldschmidt and others* [1998] 1 All ER 372 where it was held:

On an application to set aside a judgment given after a trial, in the absence of the applicant, different considerations applied than on an application to set aside a default judgment. In particular, the predominant consideration for the court was not whether there was a defence on the merits but the reason why the applicant had absented himself, and if the absence was deliberate and not due to accident or mistake, the court would be unlikely to allow a rehearing. Other relevant considerations included the prospects of success of the applicant in a retrial, the delay in applying to set aside, the conduct of the applicant, whether the successful party would be prejudiced by the judgment being set aside and the public interest in there being an end to litigation.

And we quote the Leggatt LJ at p 380:

'The general principle, as I collect it, is this, that where a party has had full notice, and has had the opportunity of availing himself of the contest, he will be bound by the decision' ... It would lead to a grave injustice if a decision ... could not be put right although by mistake or by accident it had been given in the absence of somebody who genuinely wished to come to court and oppose it.

There followed in 1978 *Midland Bank Trust v Green (No 3)* [1979] 2 All ER 193; [1979] Ch 496, in which judgment was entered as a result of a trial which the defendant deliberately elected not to attend. Oliver J ([1979] 2 All ER 193 at pp 200–201, [1979] Ch 496 at p 505) after citing extensively from *Re Barraclough* said:

> Whilst obviously it is always important that there should be finality in litigation, it does seem to me that the degree of importance of this as a conclusive factor must depend to some extent, first, on what has occurred as a result of the order which it is sought to set aside and, secondly, on the effect which the exercise of the court's discretion is likely to have. If, as in Re Barraclough, the successful parties in the litigation (and, of course, in a probate case those entitled under the will) have acted on and regulated their affairs on the basis of the decree, and if the reopening of the matter will involve, as it did there, a complete retrial on matters of fact which have already once been investigated by the court, then an applicant would, I think, have to present some overwhelmingly strong reasons before the court could be persuaded to reopen the matter and put the successful party once more in peril in a way which could scarcely be compensated in costs.

In *Craddock v Barber* [1986] CA Transcript 159 the defendant had indicated that he had no intention of attending the trial at which judgment was given against him. The judge declined to set aside the judgment. In this court Browne-Wilkinson V-C said:

> For myself, I think in a case such as this, where a party has been clearly notified of a date for trial and has deliberately chosen to absent himself, it is a most real consideration to be taken into account in assessing where the interests of justice lie. Certainly the interests of justice require that a man should at least have the opportunity of a trial; but if he chooses to ignore the opportunity given him I see no manifest injustice in not offering him a second opportunity. I am not in any way seeking to lay down any rule but I would say it was entirely open to the judge

> in this case to say that this gentleman had his opportunity, he had contumaciously decided not to take advantage of it, the defendant has an order in his favour and to reopen that would be detrimental to him, and balancing those factors reach the conclusion that the interests of justice did not require the order of (the judge) to be set aside.

[26] The learned trial judge dealt with this point in paras 18–22 of her grounds of judgment (*rekod rayuan tambahan* pp 8–9). We note the learned judge in her judgment failed to address her mind as to why the learned judge chose to exercise her discretion to refuse the defendant the right to reopen the trial. The learned judge's judgment remains 'nonspeaking' on this point which in our view constitutes an appealable error which would require appellate intervention.

[27] We therefore allowed this appeal and ordered a retrial of the matter.

Appeal allowed and ordering a retrial.

Reported by Kanesh Sundrum